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IN THE
COURT OF APPEALS OF INDIANA

DONALD A. BRADSHAW,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 11A04-0711-CV-617
	)	
DIANA D. BRADSHAW,	)	
	)	
Appellee-Petitioner.	)	

APPEAL FROM THE CLAY SUPERIOR COURT
The Honorable J. Blaine Akers, Judge
Cause No. 11D01-0611-DR-482

May 5, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

The marriage of Appellant-Respondent Donald Bradshaw ("Donald") and Appellee-Petitioner Diana Bradshaw ("Diana") was dissolved on May 18, 2007. Donald now appeals the division of marital property, child support award, post-secondary educational expenses award, and attorney's fees award. We affirm in part, reverse in part, and remand.

Issues

Donald presents four issues for our review:

I. Whether the division of the marital estate is clearly erroneous;

II. Whether the child support order is clearly erroneous because it contemplates child support for the eldest child continuing past her attainment of age twenty-one and contemplates extraordinary educational expenses for the younger child who attends public high school;

III. Whether the post-secondary educational expenses order is clearly erroneous; and

IV. Whether the trial court improperly awarded attorney's fees to Diana.

Facts and Procedural History

The parties were married on July 10, 1982. They had two children, H.B., born in September of 1986, and J.B., born in July of 1991. On January 9, 2007, Diana petitioned to dissolve the marriage.

The trial court conducted a final hearing on May 18, 2007 and dissolved the marriage. On July 2, 2007, the trial court issued its findings of fact, conclusions of law, and order dividing the marital estate and ordering the payment of child support, post-secondary educational expenses, and attorney's fees. Each party filed a motion to correct error, which

was granted in part. Donald now appeals.

Discussion and Decision

I. Property Division

A. Standard of Review – Property Division

The distribution of marital property is committed to the sound discretion of the trial court. Breeden v. Breeden, 678 N.E.2d 423, 427 (Ind. Ct. App. 1997). However, Indiana Code Section 31-15-7-5 creates a rebuttable presumption that an equal division of the marital property of the parties is just and reasonable. Akers v. Akers, 729 N.E.2d 1029, 1033 (Ind. Ct. App. 2000). A party who challenges the trial court's division of marital property must overcome a strong presumption that the court considered and complied with the applicable statute. In re Marriage of Bartley, 712 N.E.2d 537, 542 (Ind. Ct. App. 1999).

When, as here, the trial court finds the facts specially and states its conclusions thereon pursuant to Indiana Trial Rule 52, the court on appeal shall not set aside the findings or judgment unless clearly erroneous. State Farm Mut. Auto Ins. Co. v. Leybman, 777 N.E.2d 763, 765 (Ind. Ct. App. 2002), trans. denied. We review the judgment by determining, first, whether the evidence supports the findings and, second, whether the findings support the judgment. Evans v. Med. and Prof'l Collection Servs, Inc., 741 N.E.2d 795, 797 (Ind. Ct. App. 2001). We consider only the evidence favorable to the judgment and all reasonable inferences flowing therefrom, and we neither reweigh the evidence nor assess witness credibility. Id. However, appellate courts owe no deference to trial court determinations deemed questions of law. GKN Co. v. Magness, 744 N.E.2d 397, 401 (Ind. 2001).

B. Analysis – Valuation and Distribution

At the final hearing, evidence was adduced that the marital residence had recently burned down to the studs. The parties disagreed as to the appropriate course of action, with Diana preferring to rebuild and Donald preferring that the trial court order the insurance proceeds to be equally divided. The trial court ordered that Diana should have the insurance proceeds for rebuilding and also must pay the first and second mortgages. The equity (based upon a verbal appraisal obtained by Diana before the fire) was to be equally divided. To accomplish the equal division of equity, Donald was permitted to keep a corresponding portion of his pension funds before dividing with Diana.

In dividing the marital estate, the trial court set aside to Diana the value of her inheritance received two years earlier. This included over $100,000 in an investment account, a one-third interest in an automobile, and a one-third interest in a house and thirty-seven acres. Donald now argues that the trial court's award of approximately 74% of the marital estate to Diana must be reversed because (1) the trial court should have granted him a continuance to procure evidence of the value of the marital residence; (2) the trial court erroneously allowed Diana to retain her entire inheritance; and (3) the trial court allowed the diversion of insurance proceeds, which were a marital asset, to the parties' children.

Valuation. The trial court valued the marital residence at $95,000.00. This was within the range of evidence presented. Diana testified that she had sought an appraisal of the "whole homestead" and an appraiser "came out to the property" prior to the fire. (App. 237, 239.) The written appraisal had not been prepared when the fire occurred, and so Diana obtained the "verbal appraisal [of $95,000.00] over the phone." (App. 237.) Donald did not

likewise make efforts to have the property appraised before the fire. It is unclear what relevant evidence he believed could be developed after the fire had a continuance been granted. When a party fails to introduce evidence as to the value of marital property, that party is estopped from predicating appellate error on the valuation. See Galloway v. Galloway, 855 N.E.2d 302, 306 (Ind. Ct. App. 2006).

Distribution. Indiana Code Section 31-15-7-5 governs the distribution of marital property and provides as follows:

> The court shall presume that an equal division of the marital property between the parties is just and reasonable. However, this presumption may be rebutted by a party who presents relevant evidence, including evidence concerning the following factors, that an equal division would not be just and reasonable:
>
> (1) The contribution of each spouse to the acquisition of the property, regardless of whether the contribution was income producing.
>
> (2) The extent to which the property was acquired by each spouse:
> (A) before the marriage; or
> (B) through inheritance or gift.
>
> (3) The economic circumstances of each spouse at the time the disposition of the property is to become effective, including the desirability of awarding the family residence or the right to dwell in the family residence for such periods as the court considers just to the spouse having custody of any children.
>
> (4) The conduct of the parties during the marriage as related to the disposition or dissipation of their property.

Accordingly, Indiana Code Section 31-15-7-5 requires the trial court to presume that an equal division of marital property is just and reasonable, absent relevant evidence to rebut the presumption. Capehart v. Capehart, 705 N.E.2d 533, 536 (Ind. Ct. App. 1999), trans. denied.

Indiana's "one pot" theory prohibits the exclusion of any asset in which a party has a vested interest from the scope of the trial court's power to divide and award. Hann v. Hann, 655 N.E.2d 566, 569 (Ind. Ct. App. 1995), trans. denied. Accordingly, the systematic exclusion of any marital asset from the marital pot is erroneous, including those attributable to a gift or an inheritance from one spouse's parents. Wallace v. Wallace, 714 N.E.2d 774, 780 (Ind. Ct. App. 1999), trans. denied. However, although the trial court must include all assets in the marital pot, it may ultimately decide to award an asset solely to one spouse as part of its just and reasonable property division. Coffey v. Coffey, 649 N.E.2d 1074, 1077 (Ind. Ct. App. 1995); see also Indiana Code § 31-15-7-5 (providing that the trial court may consider as evidence to rebut the presumptive equal distribution "the extent to which the property was acquired by each spouse through inheritance or gift").

The trial court set aside to Diana the value of her inheritance from her parents. This resulted in a substantial deviation from the presumptive 50/50 split.

The trial court explained the deviation as follows:

> The court finds that the inherited property of the Petitioner is a marital asset. However, Petitioner recently inherited the funds and real estate in question and said funds were never co-mingled with any other assets and should be set off to her. That while the court presumes an equal division of marital property to be just and reasonable, the court has considered the factors set out in I.C. 31-15-7-5 and finds that the presumption of equal division has been rebutted by the Petitioner thereby making a equal division unjust and unreasonable.

(App. 16.) The evidentiary record supporting the deviation from the presumptive 50/50 split is as follows. Donald's earnings history and potential were significantly greater than Diana's. Diana, together with her sisters, inherited real estate and a vehicle. She also inherited cash funds, which were not placed in a joint account, although Diana testified that

she used approximately $10,000.00 of inherited funds to pay marital expenses. In short, the trial court's determination that Diana's inheritance should be set aside to her has evidentiary support.

Insurance Proceeds. Finally, we are not persuaded that the trial court set aside marital assets to non-parties. Erie Insurance, the insurer of the marital residence, had issued some checks for replacement of personal property, and Diana had cashed those checks and made certain purchases. The trial court did not order any checks to be directly disbursed to the children, or to any other third party. Rather, the trial court refused to require Diana to reimburse Donald for one-half of monies obtained by her but used for purchases in the nature of child support (replacement of fire-damaged shoes, toiletries, clothing, bedding, and a computer). We find no clear error in this regard.

II. Child Support Order

Donald challenges the trial court's order for child support to the extent that it anticipates the payment of child support after H.B. reached the age of twenty-one on September 8, 2007. Under our child support statute, a parent's child support obligation terminates when a child is emancipated or reaches age 21, except in certain circumstances, such as the incapacity of the child. Lea v. Lea, 691 N.E.2d 1214, 1215 (Ind. 1998). There is no evidence that H.B. is mentally or physically disabled. Donald's obligation to pay child support ceased when H.B. attained the age of 21. See Ind. Code § 31-16-6-6.

Donald also challenges the omission of Diana's investment income from the calculation of her income available for child support. Diana's worksheet included $51.00 of weekly income which she testified would have been earned had her inherited funds been

placed in a savings account with a 2.5% return. However, Diana testified further that her inherited funds were not in a savings account. She did not contradict Donald's testimony that her inherited funds were invested and that she earned approximately $5,000.00 annually in investment income. The Indiana Child Support Guidelines broadly define parental income to include actual income, potential income, and imputed income. Sims v. Sims, 770 N.E.2d 860, 864 (Ind. Ct. App. 2002). The trial court abused its discretion by allowing Diana to restrict available income from her investments to a savings account interest rate when her actual earnings on the investments were not so restricted.

The trial court ordered Donald to pay 62.6% "of all extraordinary school expenses" for J.B. (App. 22.) The trial court defined an extraordinary school expense as "any reasonable and related individual school expense exceeding $100.00." (App. 22.) Diana had sought contributions for J.B.'s sports, class trips, and car insurance.

However, the Commentary to Indiana Child Support Guideline 6 provides that "Extraordinary educational expenses may be for elementary, secondary or post-secondary education, and should be limited to reasonable and necessary expenses for attending private or special schools, institutions of higher learning, and trade, business or technical schools to meet the particular educational needs of the child." There is no evidence of record that J.B. attends a private or special school such that "extraordinary educational expenses" are incurred on his behalf.

On remand, the child support calculation should be revised to reflect H.B.'s attainment of age 21 and Diana's actual investment income. Moreover, the provision for the payment of extraordinary educational expenses for J.B. should be deleted.

III. College Expenses

The trial court apportioned net college expenses[1] 62.57% to Donald and 37.43% to Diana, based upon their respective incomes. Donald argues that the trial court should have set aside a portion of Diana's inherited property to pay some of H.B.'s college expenses and lessen the burden on him because he must pay out a large part of his disposable income and has minimal liquid assets.[2]

There is no absolute legal duty on the part of parents to provide a college education for their children. Neudecker v. Neudecker, 577 N.E.2d 960, 962 (Ind. 1991). However, a trial court may order a parent to pay part or all of such costs, taking into account whether and to what extent the parents, if still married, would have contributed to the child's college expenses. Eppler v. Eppler, 837 N.E.2d 167, 176 (Ind. Ct. App. 2005), trans. denied.

Here, the parents testified that they had agreed to help H.B. with college expenses but that H.B. would need to be responsible for the difference between a public and private college. The trial court's order reflects this parental agreement. Moreover, the order not only makes H.B. responsible for the difference between schools, but also allocates a one-third share of the remaining expenses to her. The remaining two-thirds is apportioned based upon respective parental incomes. Thus, Donald is not required to pay an inequitable share. We find no abuse of discretion in the trial court's apportionment of college expenses.

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[1] Although H.B. is attending a private college, the trial court decided to base its college expenses order on the costs of a public institution. H.B. was to be responsible for the excess of private school costs over public school costs, and also responsible for one-third of the public school costs.

[2] After the distribution of the marital estate, the primary asset Donald owns is his pension funds.

Donald also alleges, and Diana concedes, that the trial court improperly allocated tuition tax credits on an annual percentage basis. The briefs of the parties appear to be in agreement that the tuition tax credits, if available to either parent under Internal Revenue Service rules, will be tied to the dependency exemption, which has been allocated on a rotating annual basis. Nothing remains for our resolution in this regard.

Donald also maintains that he, and not Diana, is entitled to take out parent loans to finance his share of H.B.'s education. He seems to suggest that if Diana takes out additional loans, he is precluded from doing so.[3] However, no evidence to this effect was presented to the trial court. We cannot say that the trial court abused its discretion by failing to fashion an order precluding Diana from borrowing educational funds.

IV. Attorney's Fees

Donald challenges the order that he pay $850.00 of Diana's attorney's fees, attributable to his alleged contempt of court. He also contends that the order that his attorney prepare two Qualified Domestic Relations Orders to distribute pension funds to Diana, without requiring a contribution from Diana, is tantamount to ordering him to pay a portion of Diana's attorney's fees.

Willful disobedience of a lawfully entered court order of which the offender had notice constitutes indirect contempt. Mitchell v. Mitchell, 785 N.E.2d 1194, 1197 (Ind. Ct. App. 2003). The findings under review include a finding that Donald harassed and disturbed the peace of Diana on several occasions. However, this finding is not supported by evidence of record. Diana specifically declined to offer testimony in this regard. Thus, the award of

$850.00 of attorney's fees attributable to Donald's alleged contempt of court must be reversed.

Next, we consider the requirement that Donald's attorney prepare two Qualified Domestic Relations Orders, without contribution from Diana. The trial court acknowledged that preparation of one order would be difficult because a portion of the pension was earned prior to the marriage. Therefore, it is reasonable to assume that appreciable attorney's fees would be incurred. However, the trial court also noted that it would be more efficient for Donald, as the employee whose records were needed, to request and receive the relevant data.

The trial court has broad discretion in awarding attorney's fees. In re Marriage of Bartley, 712 N.E.2d at 546. When determining whether an award of attorney's fees is appropriate, the court may consider such factors as the resources of the parties, the relative earning ability of the parties, and other factors bearing on the reasonableness of the award. Id. When one party is in a superior position to pay fees over the other party, an award of attorney fees is proper. Id.

The trial court's findings of fact address the disparate incomes and earnings histories of the parties. The evidence of record establishes that Donald earns approximately $18 per hour while Diana earns approximately $12 per hour. Moreover, Donald was to retain a larger portion of the pension funds than was Diana. The trial court's decision to require Donald to pay his attorney for the preparation of the Qualified Domestic Relations Orders is not contrary to the facts and circumstances before the trial court.

Conclusion

[3] Diana testified that she and H.B. had already obtained one educational loan.

With regard to the division of the marital estate, the evidence of record supports the findings of the trial court and the findings support the judgment. The child support order should be revised to reflect H.B.'s attainment of age 21 and to reflect Diana's income from her actual investment choice. The award of attorney's fees due to alleged contempt of court is reversed, as is the order for extra-ordinary educational expenses of J.B.

Affirmed in part, reversed in part, and remanded.

FRIEDLANDER, J., and KIRSCH, J., concur.